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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/535,488

05/17/2005

Eckhard Floter

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EXAMINER

KELLY, YOLANDA LYNNETTE

ART UNIT

PAPER NUMBER

4174

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DELIVERY MODE

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PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/535,488	Applicant(s) FLOTTER ET AL.	
	Examiner Y. Lynnette Kelly	Art Unit 4174	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 17 May 2005.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-26 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-26 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date <u>10/17/2005</u> . | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION***Double Patenting***

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the “right to exclude” granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

1. Claims 1-5, 7, 10-18 and 20-22 of the current Application are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-11 of copending Application No. 10/535,489. Although the conflicting claims are not identical, they are not patentably distinct from each other because the claims in copending Application No. 10/535,489 are drawn to substantially the same invention and encompass the claimed invention of the current application. Since claim 1 of the current Application includes a matrix material and claim 1 of copending Application No. 10/535,489 may contain the matrixing materials salt, which is

a matrixing material, and tomato powder, which is also a starch containing material, these claims are not patentably distinct.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

2. Claims 1-5, 7, 10-18 and 20-22 of the current Application are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-9 and 11-14 of copending Application No. 10/535,484. Although the conflicting claims are not identical, they are not patentably distinct from each other because the claims in copending Application No. 10/535,484 are drawn to substantially the same invention and encompass the claimed invention of the current application.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

3. Claims 1-5, 7, 10-13, 16, 17, 20 and 22 of the current Application are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-8 and 10-12 of copending Application No. 10/587,730. Although the conflicting claims are not identical, they are not patentably distinct from each other because the claims in copending Application No. 10/587,730 are drawn to substantially the same invention as the claims in the current Application. Since claims 1 and 13 of the current Application also limit the ratio of a H3 compound,

such as palmitic acid or palm oil, to a H₂O compound, such as stearic acid, fully hardened rape fat, soybean oil or sunflower oil, these claims are not patentably distinct.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Claim Rejections - 35 USC § 112

4. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

5. Claims 1, 2, 11, 12, 17, 20, 23 and 26 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

A broad range or limitation together with a narrow range or limitation that falls within the broad range or limitation (in the same claim) is considered indefinite, since the resulting claim does not clearly set forth the metes and bounds of the patent protection desired. See MPEP § 2173.05(c). Note the explanation given by the Board of Patent Appeals and Interferences in *Ex parte Wu*, 10 USPQ2d 2031, 2033 (Bd. Pat. App. & Inter. 1989), as to where broad language is followed by "such as" and then narrow language. The Board stated that this can render a claim indefinite by raising a question or doubt as to whether the feature introduced by such language is (a) merely exemplary of the remainder of the claim, and therefore not required, or (b) a required

Art Unit: 1794

feature of the claims. Note also, for example, the decisions of *Ex parte Steigewald*, 131 USPQ 74 (Bd. App. 1961); *Ex parte Hall*, 83 USPQ 38 (Bd. App. 1948); and *Ex parte Hasche*, 86 USPQ 481 (Bd. App. 1949).

Regarding claims 1, 2, 11, 17, 20, 23 and 26, the phrase "preferably" renders the claims indefinite because it is unclear whether the limitations following the phrase are part of the claimed invention. See MPEP § 2173.05(d).

Regarding claims 1, 11, 12 and 23, the use of the parenthesis to further define H3 and H2U renders the claims indefinite because it is unclear whether the limitations following the phrase are part of the claimed invention. Examiner suggests stating the definition as part of the claim and placing the abbreviations H3 and H2U in parenthesis.

Claim Rejections - 35 USC § 102

6. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

7. Claims 1-5, 7, 10-17 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Cain et al. US 5,718,938.

In regard to claims 1, 5, 7, 10-15 and 17, Cain discloses a bakery fat composition and food products containing the composition comprising a mixture of triglycerides.

Art Unit: 1794

Column 1, lines 35-48. Cain's invention contains mixtures of saturated fatty acids having triglycerides with 16 or more carbon atoms and triglyceride fatty acids with 16 or more carbon atoms with cis-unsaturated fatty acids. Column 2, lines 18-43. The invention contains 5-80 wt. % of fat, 0-50 wt. % of water, 0-4 wt. % of salt, 20-80 wt. % of flour and 0-15 wt. % of leavening agents. *Id.* Cain describes a triglyceride ingredient B that is the same ingredient as Applicants H3 and an ingredient A that is the same as Applicants H2U. Column 3, lines 16-31. These ingredients are combined to form a fat mixture containing 10-75 wt. % H3 or S3 and 0-90 wt. % H2U or SUS. *Id.*; Column 4, line 62-Column 5, line 34. Therefore, H3+H2U may incorporate up to 100 wt. % of the fat ingredient. Also the percentages of H and U, and the ratio of H3:H2U may be any varying range within 10-75 wt. % H3 or S3 and 0-90 wt. % H2U or SUS of the fat composition.

In regard to claims 2-4, Cain teaches that the composition is blended until it becomes a homogenous mass and then it is combined with additional ingredients to create dough. Column 5, lines 46-65. The fat blend is partially covered or encapsulated by a sugar matrix, and further dispersed within a salt, egg and flour matrix. *Id.*

In regard to claim 16, Cain also teaches the use of palm oil and palm oil stearin as the triglyceride mix. Column 4, lines 18-29; Column 4, line 62- Column 5, line 34. Since palm oil is 35-45 % palmitic acid (Encyclopedia Britannica), Cain's fat composition may also contain between 30-70 wt % palmitic fatty acid.

Claim Rejections - 35 USC § 103

8. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

9. Claims 6, 8 and 9 are rejected under 35 U.S.C. 103(a) as being unpatentable over Cain et al. US 5,718,938, as applied to claims 1 and 9 above, in view of Bodnar et al. US 2002/0098275.

As stated above, Cain discloses a bakery fat composition and food products containing the composition comprising a mixture of triglycerides. Column 1, lines 5-48. Cain teaches that the composition is blended until it becomes a homogenous mass and then it is combined with additional ingredients to create dough. Column 4, line 53-Column 5, line 55. Cain does not specifically teach the addition of protein to the homogenous mass of fat mixture containing a particulate size of 1-1000 nm.

Bodnar discloses an edible water-in-oil microemulsion for use in food products which comprises diglycerides, triglycerides and monoglycerides. [004];[0027]. The emulsion may comprise from 40-97 wt. % oil, 0.1 to 25 wt. % water and other optional ingredients, such as dairy products and protein. [0017]; [0024]. Bodnar also teaches that typical triglyceride oil emulsions comprise a particle or droplet size in the range of 5 nm-200 nm. [0002]. A desirable outcome of the invention is the addition of water soluble components such as proteins, salts, sugars, sweeteners, flavoring agents,

nutrients, and seasonings to the aqueous phase of the emulsion. [0004];[0024]. In addition, it is preferred that the emulsion comprises large amounts of salt. [0025].

Since a skilled practitioner with in the art may vary percentages within a range to achieve a desired result and both Cain and Bodnar teach emulsions formed from long-chain triglycerides, it would have been obvious for a person of ordinary skill in the art at the time this invention was made to have created a long-chain triglyceride particulate composition, such as Cain's, using a typical triglyceride oil emulsion particulate size as taught by Bodnar in order to optimize the desired results. See MPEP § 2144.05(II)(A). Further, given Bodnar's teaching of added dairy products or proteins to the triglyceride emulsion, it would have also been obvious for a person of ordinary skill in the art to have added dairy protein or soy protein to Cain's long-chain triglyceride fat composition in order to obtain the optimum fat composition to create the desired product.

10. Claims 18-22 are rejected under 35 U.S.C. 103(a) as being unpatentable over Cain et al. US 5,718,938, as applied to claim 1 above, in view of Jaworski et al. US 4,126,710.

As stated above, Cain discloses a bakery fat composition and food products containing the composition comprising a mixture of triglycerides. Column 1, lines 5-48. Cain teaches that the composition is blended until it becomes a homogenous mass and then it is combined with additional ingredients, such as 0-4 wt. % salt, to create dough. Column 4, line 53-Column 5, line 55. Cain does not specifically teach the addition of herbs, spices or vegetable powder to the homogenous mass of fat mixture in order to

Art Unit: 1794

create a creamer⁵ or non-dairy creamer, flakes, cubes or particulate broths for soups or sauces.

Jaworski et al. teaches a process for preparing a sauce mix. Jaworski describes prior art in which triglycerides of desired characteristics are melted with any cereal flour/starch, such as wheat flour, and other additional ingredients, such as salt, flavorings, colorants and spices. Column 1, line 33-Column 2, line 30; Column 3, line 65-Column 4, line 35; Example I. The resultant product may be dough-like, creamy, pasty or brittle and may be shaped into bars, blocks, flakes, rods, and etcetera. *Id.* In Example III, a cream sauce is prepared by incorporating non-fat dried milk into the mixture. The mixture of triglyceride and flour may also be used to form a roux. Column 2, lines 23-30.

Since Cain discloses the long-chain triglycerides of fatty acids, a matrix and water composition of the invention claimed and Jaworski teaches a sauce mix containing triglyceride, cereal flour and additional ingredients, it would have been obvious at the time this invention was made for a person of ordinary skill in the art to use the process taught by Jaworski to form a roux, a sauce or a dairy creamer with any appropriate matrix material, including herbs and spices, and Cain's disclosed bakery fat composition. The resultant product may contain the optimum percentage of the inventive composition for the desired effect and be in the form of a particulate flake, cube or granule.

Art Unit: 1794

11. Claims 23-25 are rejected under 35 U.S.C. 103(a) as being unpatentable over Cain et al. US 5,718,938 in view of Bodnar et al. US 2002/0098275 and Jaworski et al. US 4,126,710.

As stated above, Cain discloses a bakery fat composition comprising a mixture of triglycerides. Column 1, lines 35-48. Cain's invention contains mixtures of saturated fatty acids having triglycerides with 16 or more carbon atoms and triglyceride fatty acids with 16 or more carbon atoms with cis-unsaturated fatty acids. Column 2, lines 18-43. The invention contains 5-80 wt % of fat, 0-50 wt. % of water, 0-4 wt % of salt, which may be used as a spice, and 0-15 wt. % of leavening agents. *Id.* Cain describes a triglyceride ingredient B that is the same ingredient as Applicants H3 and an ingredient A that is the same as Applicants H2U. Column 3, lines 16-31. These ingredients are combined to form a fat mixture containing 10-75 wt. % H3 or S3 and 0-90 wt. % H2U or SUS. *Id.*; Column 4, line 62-Column 5, line 34. Therefore, H3+H2U may incorporate up to 100 wt. % of the fat ingredient. Also the percentages of H and U, and the ratio of H3:H2U may be any varying range within 10-75 wt. % H3 or S3 and 0-90 wt. % H2U or SUS of the fat composition. See MPEP § 2144.05(II)(A). Cain teaches that the composition is blended until it becomes a homogenous mass and then it is combined with additional ingredients to create dough. Cain does not specifically teach the particulate size of the composition or the process in which the composition is dried.

Bodnar discloses an edible water-in-oil microemulsion for use in food products which comprises diglycerides, triglycerides and monoglycerides. [004];[0027]. The emulsion may comprise from 40-97 wt. % oil, 0.1 to 25 wt. % water and other optional

Art Unit: 1794

ingredients. [0017]. Bodnar also teaches that typical oil emulsions comprise a particle or droplet size in the range of 5 nm-200 nm. [0002].

Jaworski et al. teaches a process for preparing a sauce mix. Jaworski describes prior art in which triglycerides of desired characteristics are melted with any cereal flour/starch, such as wheat flour, and other additional ingredients, such as salt, flavorings, colorants and spices. Column 1, line 33-Column 2, line 30; Column 3, line 65-Column 4, line 35; Example I. Jaworski also teaches that food concentrates and sauce mixes of triglycerides are made "by preparing aqueous mixtures or suspensions of suitable ingredients and then removing all or most of the aqueous material by evaporative procedures such as heating, freeze drying, etc." Column 1, lines 58-65.

Since Cain, Bodnar and Jaworski teach methods for preparing emulsions formed from long-chain triglycerides, it would have been obvious for a person of ordinary skill in the art at the time this invention was made to have created a long-chain triglyceride particulate composition, such as Cain's, using a particulate size as suggested by Bodnar in order to optimize the desired results obtained. Further, given Jaworski's teaching of differing methods to dry an aqueous triglyceride fat emulsion, it would have also been obvious for a person of ordinary skill in the art to have dried Cain's long-chain triglyceride fat composition with any suitable method, such as spray-drying.

12. Claim 26 is rejected under 35 U.S.C. 103(a) as being unpatentable over Cain et al. US 5,718, as applied to claim 1 above, in view of Cain et al. 5,756,143 [hereinafter Cain '143].

As stated above, Cain discloses the composition of the invention claimed. Cain teaches that the composition is blended until it becomes a homogenous mass and then it is combined with additional ingredients to create dough for cookies, cakes, puff pastries, etc. Column 1, lines 5-28; Column 5, line 48-Column 6, line 5. Cain teaches that the composition is intended to become a percentage of a food product; however, Cain does not specifically teach that the food product is a sauce, soup or soup concentrate.

Cain '143 discloses a blend of long-chain triglycerides and saturated fats. Column 3, line 25-Column 5, line 20. Cain '143's invention may be used for all types of food products, including spreads, margarine, bakery products, sauces, soups and dressings. *Id.* In Examples V and VI the fat blend is used to make sauces and dressings. The inventive oil blend incorporates 25.0 wt. % of a range style dressing prepared in Example VI.

Given Cain's incorporation of the inventive long-chain triglyceride blend of the Cain '143 patent in sauces, soups and dressings, it would have been obvious for a person of ordinary skill in the art at the time this invention was made to have used Cain's bakery fat composition in a sauce, soup or soup concentrate.

Conclusion

13. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Kattenberg et al. US 4,016,302.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Y. Lynnette Kelly whose telephone number is (571)270-

Art Unit: 1794

3472. The examiner can normally be reached on Monday - Friday EST (First Friday Off).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Donald Tarazano can be reached on 571-272-1550. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Gwendolyn Blackwell/
Primary Examiner, AU 1794

Y. Lynnette Kelly
Examiner
Art Unit 4174

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